

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.475 OF 2003

WITH

CRIMINAL REVISION APPLICATION NO.476 OF 2003

Shri.Shamsuddin Nasruddin Shaikh ...Applicant

V/s.

Sau.Rukaiyya Shamsuddin Shaikh ...Respondent

Ms.Geeta P. Mulekar, Advocate, for the Applicant.
None for the Respondent.

CORAM : J.N. PATEL &

A.A. SAYED, JJ.

DATE : 12TH APRIL, 2007.

Per Patel J.:

1. Heard the learned counsel for the applicant.
2. These two Criminal Revision Applications can

be disposed of by a common order. In the first Criminal Revision Application No.475 of 2003, the applicant husband impugnes the order passed by the Family Court, Pune, dated 08.10.2003 in Family Court PE No.105/2003 which was filed by the applicant husband under Section 127 of the Cr.P.C. to modify the order of maintenance and cancel the maintenance granted under Section 125 of the Cr.P.C.

3. In the second Criminal Revision Application No.476 of 2003, the applicant husband impugnes the order passed by the Family Court, Pune, dated 08.10.2003 in Family Court PE No.1520/2000 which was filed by the respondent wife seeking enhancement of the maintenance from Rs.400/- to Rs.1,500/- per month wherein by the impugned judgement/order the Family Court, Pune, has enhanced the maintenance to the sum of Rs.800/- per month.

4. The applicant husband and respondent wife are governed by the Muslim Personal Law and their marriage took place on 25.12.1983 at Pune as per the Muslim Religious Rites. It is the case of the applicant husband that the respondent wife left the matrimonial home and started leading adulterous life by residing with one Faij Mohammad, who is sister's husband of the applicant and is working as a Jailor in Yerwada Prison. On 21.05.1979 the respondent wife obtained an order

from the Family Court, Pune in a petition bearing PE No.1113/1998 for maintenance at the rate of Rs.400/- per month. The applicant husband claims that on 18.12.2000 he gave talaq to the respondent wife. It was also communicated to her by registered post alongwith money order towards Iddat & Meher which was refused by the respondent wife. It appears that in the meantime the respondent wife moved the Family Court and filed PE No.1520/2000 on 28.09.2000 claiming enhancement of maintenance under Section 127 of the Cr.P.C. and on the other hand the applicant husband sought cancellation of the maintenance by filing petition in the Family Court bearing PE No.105/2003 for cancellation of the maintenance on the ground that the respondent wife is leading adulterous life and he has given talaq.

5. The Family Court, Pune, by two separate orders granted the enhancement of maintenance and dismissed the application filed by the applicant husband.

6. Though the respondent wife is served in the matter, none appears for her in response to the writ of this Court.

7. It is the contention of the learned counsel for the applicant that once having given talaq to the respondent wife on 18.12.2000 as per the Muslim

Personal Law and having complied with all the requirements of offering maintenance during the period of Iddat and returning the amount of Meher, the respondent wife was not entitled to claim maintenance. Secondly, that the respondent wife is residing with Faij Mohammad and leading adulterous life, she is not entitled to claim any maintenance and therefore, the Family Court ought to have dismissed the application filed by the respondent wife for maintenance and allowed the application of the applicant husband for modifying order of maintenance by cancelling the same on these two grounds.

8. The learned counsel for the applicant has taken us through the evidence on record and cited various authorities on the issue.

9. The only point which requires consideration is as to whether the impugned judgements and orders passed by the Family Court, Pune, are illegal and/or improper.

10. In so far as the first contention of the learned counsel for the applicant husband that he having given talaq does not entitle the respondent wife to claim maintenance, though supported by a Full Bench decision of this Court rendered in the case of Karim Abdul Rehman Shaikh V/s. Shehnaz Karim Shaikh & Ors. II(2000) DMC 634 (FB), and of Division Bench decision

of this Court rendered in the case of Shahanaz Begum Kadarbasha Shaikh & Anr. V/s. Kadarbasha Usman Shaikh & Anr. I(2002) DMC 375 and the decisions of the other High Courts on the issue cannot be considered for the reason that there is no adjudication on the issue whether factually talaq has been given by the applicant husband to his wife and in accordance with the Muslim Personal Law, for want of adjudication before the competent forum though this issue has been taken as a ground in support of his application seeking cancellation of maintenance. Further in view of the decision rendered by the Five Judge Bench of the Supreme Court in the Danial Latif and Anr. V/s. Union of India II (2001) DMC 714 SC, the authorities cited by the learned counsel in support of the claim that on giving talaq a Muslim husband is not liable to maintain his wife cannot be said to be the correct view and this Court is bound by the decision rendered by the Supreme Court in Danial Latif's case.

11. Now we are left with the other ground on which the applicant husband claims that the respondent wife becomes disentitled to claim maintenance as she is leading adulterous life and residing with Faij Mohammad.

12. In our view no authorities are required on the issue that the wife which includes a woman who has been

divorced by her husband will not be entitled to receive an allowance for the maintenance or interim maintenance, as the case may be, from her husband under this section if she is living in adultery and on proof of such fact that any wife in whose favour an order has been made under this section who is leading adulterous life, a Magistrate shall cancel the order. In this case the Family Court would cancel the order.

13. In order to prove this fact that the respondent wife is leading adulterous life by staying with Faij Mohammad, the applicant husband has examined his own sister Nasim Faij Mohammad Shaikh who is the wife of Faij Mohammad Shaikh with whom the respondent wife is residing. From the cross-examination of Nasim Faij Mohammad Shaikh who was examined as Witness No.2 for the petitioner in PE No.105/2003, it is quite clear that the respondent wife is residing with Faij Mohammad Shaikh who is the husband of Nasim Faij Mohammad. In the cross-examination of this witness nothing has been brought on record to show that Ms.Nasim Bano is not telling the truth or is a got up witness and there is no reason to disbelieve her, as she is also the victim of circumstances whose husband is residing with her sister-in-law.

14. The learned counsel for the applicant pointed out to this Court that the respondent wife was required

to be served at the address of Faij Mohammad Shaikh, Jailor, Yerawada Central Prison, Pune. Even Nasim wife of Faij Mohammad Shaikh in her deposition has categorically stated that she found her husband residing with the respondent wife and that she made a complaint to the Inspector General of Prisons.

15. We find that the Family Court has overlooked this material evidence and treated it in a casual manner by observing that mainly because a person is residing with relative would not be sufficient to say that she is living in adultery. The learned Judge of the Family Court, Pune, probably failed to consider that the respondent wife who has been residing separately from her husband may not go and reside with the husband of her husband's sister but with her own family or relative. There have been two photographs produced by Ms.Nasim Faij Mohammad Shaikh which have been taken on record which shows the respondent wife with her husband and it is her case that she happened to get in possession of these photograph by chance. There is no reason to disbelieve the witness on this count. It was never the case of the respondent wife that she has been provided with shelter by Faij Mohammad and that Faij Mohammad is residing alongwith his family members and provided shelter to the respondent wife and therefore we find that the learned Judge of the Family Court ought to have allowed the

application of the applicant husband for cancelling the order of maintenance and ought to have rejected the application of the respondent wife for enhancement on this count alone.

16. We, therefore, quash and set aside the impugned orders and allow both the Criminal Revision Applications with no order as to costs.

[J.N. PATEL, J.]

[A.A. SAYED, J.]